Supreme Court, U.S.
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In The

Supreme Court of the United States

MAGDALENA MINER,

Petitioner,

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the First Circuit erred in its determination that a Petitioner is removable under 8 U.S.C. § 1182(a)(6)(C)(ii); INA § 212(a)(6)(C)(ii) and precedent case law if he/she promptly retracted his/her initial claim to United States citizenship where there is: (1) a desirability of national uniformity given the grave consequences of a negative finding; (2) ambiguity of the statute and corresponding regulations; (3) a dearth of law in all circuits related to these questions; (4) a high volume of cases that this issue implicates; and (5) a severe impact of a negative finding on an alien's immigration prospects.

PARTIES TO PROCEEDING

Magdalena Miner, Petitioner

Eric Holder, U.S. Attorney General, Respondent

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OPINION AND JUDGMENT BELOW

The Court of Appeals' unpublished order is unofficially reported at *Miner v. Holder*, No. 09-2295 (1st Cir. Sep. 27, 2010) and reprinted in the Appendix at App. 23.

STATEMENT OF JURISDICTION

By judgment entered August 2, 2010, the United States Court of Appeals for the First Circuit dismissed Petitioner's petition for review. By judgment entered September 27, 2010, with Mandate issued on October 5, 2010, the United States Court of Appeals for the First Circuit denied Petitioner's petition for rehearing en banc.

Petitioner thereafter timely filed this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

INA § 212(a)(6)(C)(ii) provides that "any alien who falsely represents himself or herself to be a citizen of the United States for any purpose or benefit under this chapter of Federal or State law is inadmissible."

STATEMENT OF THE CASE

Removal proceedings were initiated against the Petitioner when the U.S. Citizenship and Immigration Services served Petitioner with a Notice to Appear. Petitioner applied for relief from removal in the form of adjustment of status and voluntary departure.

On June 14, 2007, the Immigration Judge (IJ) denied Petitioner's applications for adjustment of status and voluntary departure. Petitioner timely appealed the IJ's decision to the Board of Immigration Appeals (BIA). By order dated August 21, 2009, the BIA denied the Petitioner's applications for relief.

Petitioner thereafter timely filed a Petition for Review with the United States Court of Appeals for the First Circuit. This petition for review was based on a final agency determination. 8 U.S.C. § 3.1(a)(7). The First Circuit had jurisdiction based upon 8 U.S.C. § 1252(a)(2)(B)(ii).

By judgment entered August 2, 2010, the First Circuit dismissed Petitioner's petition for review. By judgment entered September 27, 2010, with Mandate issued on October 5, 2010, the First Circuit denied Petitioner's petition for rehearing en banc. Petitioner now timely petitions this Court for review.

Petitioner is a native and citizen of Poland who was born on July 1, 1980. She entered the United States on June 16, 2002, with a J-1 visa. On February 12, 2006, Petitioner married Michael Miner, a United

States citizen. On June 9, 2006, Mr. Miner filed an I-130 relative petition on behalf of Petitioner. On February 7, 2007, the I-130 visa petition was approved. A.R. 183.

On or about October 2005, Petitioner travelled with a friend to the Champlain border crossing in order to bring her friend's sister's children to meet their mother. A.R. 89. The Petitioner did not leave the United States or enter Canada. While they were waiting outside, a Customs and Border Protection Officer approached Petitioner and asked her status. Out of fear, the Petitioner falsely responded that she was a United States citizen. A.R. 99. The officer brought the Petitioner inside the station and asked her again if she was a U.S. citizen. A.R. 101. The Petitioner immediately recanted and stated that she was not a citizen. *Id.* Petitioner testified that approximately five minutes had passed since the time Petitioner recanted her statement. *Id.* Petitioner was later put in removal proceedings.

Petitioner's husband, Michael Miner, testified that he first met his wife in September 2003. A.R. 107. Mr. Miner was adopted after a few months of his birth and abandoned by his biological parents. Thereafter, he was abandoned by his father. A.R. 124. Petitioner's husband has a fear of abandonment due to his childhood experiences. *Id.*

The Border Patrol did not charge the Petitioner with making a false claim. A.R. 132. The Immigration Judge, BIA, and First Circuit found the Petitioner

ineligible for relief for making a false claim of U.S. citizenship.

REASONS FOR GRANTING THE WRIT

ARGUMENT OF THE FIRST ISSUE

Writ of Certiorari should be granted in this case in order for this Honorable Court to address the issues surrounding an effective recantation in an immigration context under 8 U.S.C. § 1182(a)(6)(C)(ii) and INA § 212(a)(6)(C)(ii). In this case, there is (1) insufficient attention by the IJ, BIA, and First Circuit to the questions identified here; (2) the desirability of national uniformity given the grave consequences of a negative finding; (3) the ambiguity of the statute and corresponding regulations; (4) the dearth of law in all circuits related to these questions; (5) the high volume of cases that this issue implicates; and (6) the severe impact of a negative finding on an alien's immigration prospects.

INA § 212(a)(6)(C)(ii) states that "any alien who falsely represents himself or herself to be a citizen of the United States for any purpose or benefit under this chapter of Federal or State law is inadmissible." Section 344(a) Public Law 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), did not create any waivers for immigrants found inadmissible under section 212(a)(6)(C)(ii) of the Act. Therefore, immigrants found inadmissible

under section 212(a)(6)(C)(ii) of the Act are **permanently** inadmissible to the United States.

The only defense to such a finding is a timely retraction. This defense has only been established through precedent case law and the Foreign Affairs Manual. The Foreign Affairs Manual used by the Department of State clearly states that "a timely retraction will serve to purge a misrepresentation and remove it from further consideration" as a ground for INA 212(a)(6)(C) inadmissibility. 9 FAM 40.63 N4.6. The Manual further states that when an alien is interviewed, that aliens must be warned of the penalty imposed by INA § 212(a)(6)(C) at the outset of every initial interview. *Id.* The Foreign Affairs Manual also warns about the gravity and impact such determinations have on the immigrant:

> When considering whether to impose such a dire penalty, keep in mind the words quoted by the Attorney General in his landmark opinion on this matter. (The *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961)): "Shutting off the opportunity to come to the United States actually is a crushing deprivation to many prospective immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States." 9 FAM 40.63 N1.3.

Precedent case law has determined that a critical factor to consider is whether the alien timely retracts

or recants his or her claim. Retraction serves to excuse the misrepresentation by showing that the alien lacked the requisite intent to make a false statement. *Cf. Llanos-Senarillos v. U.S.*, 177 F.2d 164, 165 (9th Cir. 1949) ("If the witness withdraws the false testimony of her own volition and without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn").

In and out of an immigration context, other areas of the law have afforded the Declarant an opportunity to voluntarily recant his/her statement and avoid prosecution. In a criminal context, perjury is excused when a recantation is made before the government or in a grand jury proceeding. *U.S. v. Crandall*, 363 F. Supp. 648, 654 (W.D.Pa. 1973) ("statement afforded to the government [and read to grand jury] was equivalent to having been made in the grand jury proceeding"), *aff'd*, 493 F.2d 1401 (3d Cir. 1974), *cert. denied*, 419 U.S. 852 (1974); 18 U.S.C. § 1623(d) (1982). This makes an effective recantation a bar to prosecution, requiring that the Declarant admit that his prior statement was "false." *Id.* The Second Circuit held that "[a]n outright retraction and repudiation of his false testimony is essential to a 'recantation' within the meaning of the statute." *U.S. v. D'Auria*, 672 F.2d 1085, 1092 (2d Cir. 1982). The First Circuit has also recognized a recantation in the context of 18 U.S.C. § 1623(d), stating that an effective recantation requires "an outright retraction and

repudiation." *U.S. v. Sebaggala*, 256 F.3d 59, 64 (1st Cir. 2001).

Similarly, under Title 8, Section 1158(d), if the Attorney General determines that an alien has knowingly made a frivolous application for asylum *and* the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter.

However, there is a split among the Circuit courts whether a frivolous asylum claim may be recanted or withdrawn. The Sixth Circuit has held that a withdrawn asylum application may form the basis of a valid frivolousness finding, although it did not address the ambiguities in the statutory language. *See Lazar v. Gonzales*, 500 F.3d 469, 476 (6th Cir. 2007) ("Lazar's withdrawal of his asylum application did not obviate the need for the IJ to determine whether his false application should be deemed frivolous. . . . [T]he IJ's frivolousness finding was not mooted by the withdrawal of his application.").

The Eleventh Circuit reached the same conclusion in a case where the alien filed an amended asylum application, although he did not withdraw the first application with material misstatements. *See Barreto-Claro v. U.S. Att'y Gen.*, 275 F.3d 1334, 1339 (11th Cir. 2001) (permitting frivolousness finding against alien because of misstatements in first asylum application, which alien replaced prior to hearing with accurate, amended application).

In contrast, the Third Circuit has held that false statements in a time-barred asylum application are not "material" and therefore cannot form the basis for a frivolousness finding because the application could not be granted under any circumstances and thus the misstatements "had neither the natural tendency nor the capability of influencing the decision." *Luciana v. Att'y Gen.*, 502 F.3d 273, 280 (3d Cir. 2007). *But see Mingkid v. U.S. Att'y Gen.*, 468 F.3d 763, 768 (11th Cir. 2006) (finding no barrier to frivolousness finding with respect to time-barred application); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (assuming same, without analysis). The logic of Luciana could potentially be extended to false statements in an asylum application withdrawn before a decision on the merits.

In *Zheng v. Mukasey*, the Second Circuit looked at whether the doctrine of timely recantation, found elsewhere in its jurisprudence, has any application in this context. 514 F.3d 176 (2d Cir. 2008); *see also Matter of M-*, 9 I&N Dec. 118, 119 (BIA 1960) ("[W]here an alien in an immigration proceeding testifies falsely under oath as to a material fact but voluntarily and without prior exposure of his false testimony comes forward and corrects his testimony, perjury has not been committed and the charge based thereon is not sustained."). Here, also at least one non-precedential BIA opinion has declined to rule out the possibility that timely recantation could apply in this context. *In re Lazar*, A72 026 924 at 1 (BIA Feb. 17, 2006) ("[E]ven if there could be circumstances in

which a timely retraction of a deliberate material fabrication could be effective to preclude a finding of frivolousness, . . . such a timely retraction did not occur.") Here, the Second Circuit did find that a timely recantation was made and remanded the case due to several factors.

Remand is appropriate in this case as a matter of discretion due to the (1) insufficient attention by prior decisions to the questions identified here; (2) the desirability of national uniformity given the grave consequences of a frivolousness finding; (3) the ambiguity of the statute and corresponding regulations; (4) the dearth of law in this circuit related to these questions; (5) the high volume of cases that this issue implicates; and (6) the severe impact of a frivolousness finding on an alien's immigration prospects. *See also Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 116-17 (2d Cir. 2006).

In *Matter of X-M-C-*, the BIA recently concluded that a recantation will not be effective where an alien was provided the warnings on the asylum application, was verbally given the warnings by the Immigration Judge, and thereafter later chose to falsely testify. 25 I&N Dec. 322 (BIA 2010).

The BIA came to this determination concluding that the safeguards outlined in *Matter of Y-L-* amply protect an asylum applicant and give the alien an opportunity to recant a statement or withdraw the application prior to acknowledging the frivolous

application warnings. 24 I&N Dec. 151 (BIA 2007); *see also Matter of X-M-C-*, 25 I&N Dec. at 325-26.

In this case, Petitioner is not removable under 8 U.S.C. § 1182(a)(6)(C)(ii) because she promptly retracted her initial claim to United States citizenship. Here, *Matter of X-M-C-* should be distinguished from the case at hand as the Petitioner's misrepresentation was not premeditated and she was not given warnings of its implications. Furthermore, the Petitioner's statement was not made under oath or during a formal interview.

Initially, the IJ erroneously found that there is not "a provision in the law which allows a timely retraction." A.R. 44. The decision in this case is clearly inconsistent with precedent case law. In *Matter of M-*, the BIA found that there was a timely retraction where an alien corrected false statements to an immigration officer voluntarily and prior to exposure of the misrepresentation. 9 I&N Dec. 118. In that case, the alien falsely claimed to be a lawful permanent resident when attempting to enter the United States. The BIA determined that the alien timely recanted, therefore did not face a good moral character bar when applying for relief. *Id.* In this case, the Board does not mention that the discovery must be imminent. In *Matter of R-R-*, the applicant presented a fraudulent birth certificate indicating that he was a U.S. citizen in order to gain entry into the U.S. 3 I&N Dec. 823 (BIA 1949). However, the applicant recanted within *24 hours*. Here, the BIA found that the "***24 hour***" recant was "timely." *Id.*

(emphasis added). The facts can be compared to this case, where the Petitioner recanted after minutes.

In *Matter of Namio*, the Board found that an alien's correction of a false statement made *under oath* to a border patrol officer, when *one year* had passed and disclosure of the falsity was imminent, was not a timely retraction. 14 I&N Dec. 412 (BIA 1973). In *Namio*, the Board cited *Llanos-Senarillos*, which held that "if a witness withdraws his false testimony of his own volition and without delay, the false statement and its withdrawal may be found to constitute an inseparable incident out of which an intention to deceive cannot rightly be drawn. 177 F.2d 165; *Namio*, at 414 n. 3. This case can be distinguished from the case at hand as the Petitioner did not make the statement under oath.

Furthermore, the Foreign Affairs Manual used by the U.S. Department of State also provides guidance to similar circumstances. The manual states that "a timely retraction will serve to purge a misrepresentation and remove it from further consideration." 9 FAM 40.63 N4.6; *Costa v. Mukasey*, 2007 WL 4296754 (3d Cir. Dec. 10, 2007) *also cited by Matter of R-S-J-*, 22 I&N Dec. 863 (BIA 1999). Here, it is clear that the BIA has established an exception or defense in these types of cases. Accordingly, these same standards should be applied to the facts of this case. The Petitioner's timely and voluntary retraction should have served to purge her record and remove it from further consideration. The First Circuit's

decision in this case has contradicted precedent case law on this matter.

ARGUMENT OF THE SECOND ISSUE

In this case, the Petitioner lacked the requisite intent to deceive as she immediately recanted her statement. There is no clear ruling by any of the circuits addressing whether INA § 212(a)(6)(C)(ii) requires evidence of an alien's intent to misrepresent himself as a United States citizen.

Four circuits have upheld BIA decisions finding inadmissibility under this subsection in aliens who falsely represented their circumstances of birth in **passport applications** in ways that implied United States citizenship. *See Barcenas-Barrerra v. Holder*, 2010 U.S. App. LEXIS 18519 (5th Cir. 2010); *Vana v. Att'y Gen.*, 341 F. App'x 836, 839 (3d Cir. 2009); *Jackson-Omier v. Gonzales*, 246 F. App'x 1, 1 (1st Cir. 2007); *Rodriguez v. Gonzales*, 451 F.3d 60, 65 (2d Cir. 2006); *Sowah v. Gonzales*, 196 F. App'x 576, 577 (9th Cir. 2006).

In *Vana*, the Third Circuit rejected Vana's argument "that 'scienter' is an implied requirement of a 'false claim of United States citizenship.'" 341 F. App'x at 838 (addressing alien's assertion that he had not intended to represent himself as a United States citizen, but merely "allowed someone to file a passport application for him because he had been told [it] would give him the right to work"). The court in

Vana did not conduct a full analysis of the argument, relying instead on a Second Circuit decision that did not need to explore the intent issue because the alien admitted intent. *Id.* (citing *Rodriguez*, 451 F.3d at 65 (relying on alien's admission of falsely representing himself as a citizen)). In *Barcenas-Barrerra*, the Court determined that "in the absence of more specific guidance from the BIA, we do not decide specifically whether § 1182(a)(6)(C)(ii) requires evidence of the alien's intent to falsely claim United States citizenship and, if so, how much evidence it requires. While we have recognized that remand to the BIA for clarification of its decisions is possible and proper, *see Ismail v. Gonzales*, 245 F. App'x 366, 369 (5th Cir. 2007) (citing *INS v. Ventura*, 537 U.S. 12, 16 (2002)) we need not pursue that course here because of the volume of evidence specifically noted in the BIA's decision." 2010 U.S. App. LEXIS 18519 at 8.

All of these cases can be distinguished from the case at hand as they involve a deliberate, premeditated misrepresentation of information. A willful misrepresentation is a misrepresentation that is deliberate, voluntary, and knowingly false. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); 9 FAM 40.63 N5.1 (providing that willfully means "knowingly and intentionally, as distinguished from accidentally, inadvertently, or an honest belief that the facts are otherwise . . . "). [A] material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted

in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

In this case, the Petitioner lacked the requisite "intent" in making her false statement. The Petitioner did not premeditate the misrepresentation, but made it out of fear and then immediately retracted the statement within minutes. The Petitioner's actions were not premeditated as she was not seeking entry into the United States, employment, the right to vote or any other privilege under State or Federal law. Here, this case can be distinguished in that the Petitioner was not making a false representation to Border Patrol in order to gain entry into the United States. *See Jamieson v. Gonzales*, 424 F.3d 765 (8th Cir. 2005); *Pichardo v. INS*, 216 F.3d 1198, 1201 (9th Cir. 2000) (falsifying citizenship on a birth certificate, a violation of federal immigration law, bars entry); *Rana v. Gonzales*, 175 F. App'x 988, 996 (10th Cir. 2006) (falsely claiming United States citizenship in order to obtain employment bars admissibility). Here, the INA specifies that a false statement must be made *in order to procure a benefit*. Here, the intent was out of "fear." As such, the Petitioner lacked the requisite intent to be found inadmissible under INA § 212(a)(6)(C)(ii).

ARGUMENT OF THE THIRD ISSUE

The Petitioner made a timely retraction in accordance with precedent cases. The BIA and panel also abused its discretion since its findings in this case are contrary to precedent cases similar to the case at hand. In *Matter of M-*, the BIA found that there was a timely retraction where an alien corrected false statements to an immigration officer voluntarily and prior to exposure of the misrepresentation. 9 I&N Dec. 118. A close look at the testimony and evidence reveals that the Petitioner timely recanted her statement in accordance with precedent. The BIA decision erroneously states that the Petitioner recanted "only when the discovery of her illegal status was imminent." A.R. 4. The First Circuit also determined that this exception did not apply since the discovery was imminent. *Miner v. Holder*, No. 09-2295 (1st Cir. Sep. 27, 2010). In making this erroneous determination, the panel has not considered the record as a whole. The government cites the Petitioner's testimony out of context. The Petitioner first states:

> Before they ask me again, am I a citizen, and I said no I am not a citizen and yeah they probably found information about me. A.R. 100.

Here, this statement, which the BIA and panel relied on, is inconclusive as to the timeframe.[1] The Petitioner is then asked to clarify the sequence of events in her testimony. She states:

> Q. And did they take to a – did they have you sit somewhere?
>
> A. They asked me again about my status, and I said no I am not a citizen of America, of United States of America. And they ask me to sit and probably they're looking for my information in the computer. A.R. 101.

Here, the testimony reflects that the Petitioner recanted her statement a "*few minutes later . . .* " A.R. 39. The Petitioner was brought inside the building and it was at that point that she voluntarily recanted her statement. The Board and panel must consider the circumstances surrounding her withdrawal of her statement in that it would only take minutes for the Border Patrol to discover status. However, the Petitioner recanted the statement immediately upon entering the building and after being asked again. The Petitioner voluntarily recanted *prior* to the discovery by the Border Patrol that she was not a citizen. Also, the Petitioner voluntarily withdrew her statement within *minutes*. As such, the decision in this case is

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[1] The decision does take into account that the Petitioner's English is "broken" in that it is not grammatically correct throughout her testimony. As such, the Petitioner's further explanation of the sequence of events should be more conclusive rather than one sentence taken out of context.

clearly contrary to other cases decided by the BIA and other Circuits. As the Board observed in *Matter of M-*, the retraction must be made voluntarily and without prior exposure of the false statement. 9 I&N Dec. 118. In this case, the Petitioner timely retracted her statement according to the exception.

Furthermore, it is evident that the prior decisions erred in finding Petitioner removable on this ground because she timely retracted the false statement. Here again, it is apparent that the Petitioner did not have the "intention to deceive" as she immediately recanted her false prior statement.

The Petitioner recanted her statement within minutes and prior to exposure of the false statement. "If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable." *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994). Here, it is apparent that the First Circuit has deviated from precedent decisions regarding this matter in an arbitrary and capricious manner. The conclusions are not supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Gebremichael v. INS*, 10 F.3d 28, 34 (1st Cir. 1993).

Furthermore, the Foreign Affairs manual used by the U.S. Department of State also provides guidance to similar circumstances. The manual states that "a timely retraction will serve to purge a misrepresentation and remove it from further consideration."

9 FAM 40.63 N4.6. In this case, the Petitioner's retraction should have served to purge her record and remove it from further consideration.

The conclusions are not supported by "reasonable, substantial, and probative evidence on the record considered as a whole." *Gebremichael,* 10 F.3d at 34. The Service did not provide testimony from the Border Patrol officers. It is apparent that the Border Patrol did not consider Petitioner's actions as a "false claim to citizenship." This idea is emphasized since the Border Patrol **did not charge her** with making a false claim. Furthermore, there is evidence that the Petitioner did retract her statement. The I-213 charging document issued by ICE does clearly state that the Petitioner retracted her claim to citizenship because she feared returning to her country. A.R. 179. Also, the Notice to Appear charging did not charge her with being inadmissible under INA § 212. A.R. 299-300.

The Petitioner's testimony and evidence establish that she should not be "charged" with making a false claim to citizenship. Wherefore, in accordance with precedent decisions on this matter, the Petitioner's retraction should have served to purge her record and accord her eligible for the requested relief.

CONCLUSION

Wherefore, based on the foregoing, Petitioner respectfully asks that this Petition for a Writ of

Certiorari be granted and that the Petitioner be granted relief. The cursory and unjust decision in this case has resulted in a clear deprivation of rights and permanent ban on the Petitioner's admission to the United States. Other areas of the law, in and out of an immigration context, have afforded the Declarant an opportunity to voluntarily recant his or her statement and avoid prosecution. The Petitioner in this case has clearly fallen within those circumstances.

The First Circuit panel has clearly deviated from the precedent established. It is within the interests of justice that this Honorable Court grants certiorari in this case.

Respectfully submitted,

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Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A098 928 014 – Boston, MA Date: Aug 21 2009

In re: MAGDALENA ARCISZEWSKA a.k.a.
Magdalena Miner

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: William E. Graves,
Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act
[8 U.S.C. § 1227(a)(1)(B)] –
In the United States in violation
of law

APPLICATION: Adjustment

The respondent, a native and citizen of Poland, appeals from an Immigration Judge's June 14, 2007, decision denying the respondent's application for adjustment of status under section 245(i) of the Immigration and Nationality Act. 8 U.S.C. § 1255(i). Specifically. the respondent challenges the Immigration Judge's decision finding the respondent inadmissible under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), and thus statutorily ineligible for adjustment of status. The respondent also contests the Immigration Judge's decision denying

the respondent's request for voluntary departure. The respondent's appeal will be dismissed.[1]

It is undisputed that the respondent entered this country on or about June 16, 2002, with permission to remain until or about April 7, 2003. In October of 2005, the respondent was stopped by United States border patrol officials on the United States side of the United States/Canadian border. It is undisputed that the respondent falsely claimed to be a United States citizen when questioned about her status by the border patrol agents. The respondent testified that she claimed citizenship because she was scared and did not want to be returned to Poland (Tr. at 13, 20, 23). Thereafter, the respondent was placed in removal proceedings wherein she admitted the allegations and conceded removability as charged (Tr. at 3). During the pendency of her removal proceedings, the respondent married a United States citizen, became the beneficiary of an approved visa petition, and applied for adjustment of status. The Immigration Judge denied the respondent's application for such relief finding that the respondent made a false claim to citizenship as defined in section 212(a)(6)(C)(ii) of that Act, and as such, the respondent is inadmissible and thus statutorily ineligible for adjustment of status.

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[1] The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7) (2009). Likewise, as we find this matter inappropriate for three member review, the respondent's request for such review is denied. *See* 8 C.F.R. § 1003.1(e)(6).

We affirm the Immigration Judge's decision denying the respondent's application for adjustment of status. Specifically, we find no error in the Immigration Judge's determination that the respondent made a false claim to United States citizenship as defined in section 212(a)(6)(C)(ii) of the Act, which renders the respondent inadmissible and thus statutorily ineligible for adjustment. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (stating that the Board reviews questions of law *de novo*). Nor do we find clear error in the factual findings leading up to that determination. *See* 8 C.F.R. § 1003.1(d)(3)(i) (mandating that the Board "will accept the determination of factual issues by an immigration judge . . . unless the determination is clearly erroneous").

The respondent on appeal contends that she did not claim citizenship for "any purpose or benefit" under the Act as required by section 212(a)(6)(C)(ii) of the Act. In the alternative, the respondent asserts that, even if her statement qualifies as a false claim to citizenship under the Act, she timely recanted such claim and, therefore, is not inadmissible under section 212(a)(6)(C)(ii) of the Act. As the Immigration Judge noted, the respondent claimed citizenship in an attempt to avoid further questioning and evade the detection of her unlawful status, i.e., to avoid being placed into removal proceedings under the Act (I.J. at 9-10). Thus, the respondent claimed citizenship for "any purpose or benefit," to avoid removal proceedings, under the Act. Furthermore, we concur with the Immigration Judge's finding that the respondent did

not timely recant her claim as she did so only when the discovery of her illegal status was imminent (I.J. at 9; Tr. at 24-25, 45). Under the circumstances, we affirm the Immigration Judge's decision finding that the respondent made a false claim to United States citizenship as defined in section 212(a)(6)(C)(ii) of the Act, which renders the respondent inadmissible. As such, we decline to set aside the Immigration Judge's determination that the respondent is statutorily ineligible for adjustment.

The respondent on appeal also asserts that the Immigration Judge failed to give proper weight to the Department of Homeland Security's ("DHS") decision not to charge the respondent with inadmissibility under section 212(a)(6)(C)(ii) of the Act. That argument is without merit. The decision to assign charges in a particular case lies within the prosecutorial discretion of the DHS, and is a decision that neither the Immigration Judge nor the Board has authority to review. *See, e.g., Matter of Bahta,* 22 I&N Dec. 1381, 1391 (BIA 2000); *Matter of Singh,* 21 I&N Dec. 427, 433-35 (BIA 1996). Moreover, as the Immigration Judge correctly noted, whether the respondent is eligible for adjustment of status is a statutory decision. As such, the Immigration Judge committed no error in declining to weigh the DHS's charges, or lack thereof, in determining the respondent's statutory eligibility for adjustment. We find that the Immigration Judge's conduct and questioning was well within proper judicial bounds. *See Matter of Rhee,* 16 I&N

Dec. 607 (BIA 1978); *cf. Matter of Exame*, 18 I&N Dec. 303 (BIA 1982).

Overall, the record reveals that the respondent received a full and fair hearing on the merits of her claim. The respondent was represented by counsel and afforded the opportunity to present, examine, and object to evidence that affected her claim. Although the respondent alleges error, she has not articulated or identified prejudice stemming from such errors. More importantly, the respondent has failed to demonstrate that the outcome of her case would have been different had the hearing been conducted in any other manner.

Finally, we affirm the Immigration Judge's decision denying the respondent's application for voluntary departure in the exercise of discretion. The Immigration Judge largely based his decision on the circumstances surrounding the respondent's 2005 false claim to United States citizenship. On appeal, the respondent has not come forward with any countervailing equities or favorable factors, that were not considered by the Immigration Judge, demonstrating reversible error in the Immigration Judge's decision.

On the whole, the record supports the Immigration Judge's resolution. Accordingly, we will enter the following order.

ORDER: The respondent's appeal is dismissed.

/s/ Roger A. Pauley
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Boston, Massachusetts

File A 98 928 014 June 14, 2007

In the Matter of

MAGDALENA MINER,	)	
a.k.a.	)	IN REMOVAL
MAGDALENA ARCISZEWSKA,	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act.

APPLICATIONS: Adjustment of status under Section 245(a); voluntary departure in the alternative.

ON BEHALF OF THE RESPONDENT:

Yoav Tadmor, Esquire
Tadmor and Tadmor, LLI.
Attorneys-at-Law
340 Main Street, Suite 610
Worcester, Massachusetts 01608

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Michael Brennan, Esquire
Assistant Chief Counsel
Department of Homeland Security
Room 425, JFK Federal Building
Boston, Massachusetts 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in these proceedings is a married female, native and citizen of Poland. She asserts that her date of birth is July 1 of 1980. She was placed into removal proceedings through the issuance of a Notice to Appear dated October 24, 2005. See Exhibit 1. That document is also known as a form I-862. The respondent, through counsel, submitted written pleadings in this case. See Exhibit 2. In those written pleadings, at Exhibit 2, the respondent admits allegations one to four, concedes removability, designates Poland, and seeks adjustment of status and voluntary departure in the alternative. At one point the respondent sought administrative closure, although the Department of Homeland Security never agreed with that form of relief, and therefore, this Court, has never granted that form of relief.

This Court did conduct a full and complete hearing on the respondent's adjustment of status application and the respondent's application for voluntary departure. Its decision follows below.

ANALYSIS AND DECISION

The issue at the forefront of this hearing and the respondent's application to adjust status is the respondent's claim to United States citizenship. When she was questioned by Customs and Border Patrol officers on October 24, 2005, at the Champlain, New York port of entry. Exhibit 5, in this record, contains

an I-213 record of deportable inadmissible alien, executed by the Customs and Border Patrol officer, Noel Barriere. That document indicated that the respondent was encountered at the port of entry in Champlain, New York on October 24th, 2005, after she and a friend exited their motor vehicle on the northbound lane of interstate I-87 on the United States side of the United States/Canadian border. This document goes on to set forth that the respondent and her friend escorted two children to their mother, a Ukrainian citizen who is a permanent resident of Canada, who was awaiting the children's arrival just several meters south of the Canadian port of entry.

The document goes on to note that when the respondent was, initially, approached by the Custom and Border Patrol officer, that the respondent claimed to be a United States citizen. During later questioning, she explained, to the officers, that she had falsely claimed United States citizenship in an effort to return to her residence in Worcester, Massachusetts because she feared being returned to Poland. The I-213 notes that the respondent was last admitted to the United States at Boston, Massachusetts through Logan Airport on June 16, 2002 as a J-1 non-immigrant visitor with authorization to remain in the United States for an unknown period of time. The document goes on to note, however, that the respondent filed an I-539 extension of her stay that was denied on April 7, 2003.

In fact, the respondent has conceded, in these proceedings, that she was admitted to the United States at Boston, Logan Airport, on June 16, 2002, as a non-immigrant J-1 with authorization to remain in the United States for a temporary period not to exceed April 7, 2003 and that she remained beyond April 7, 2003 without authorization from the Immigration and Naturalization Service.

The respondent argues that this Court should not find her statement to the Custom and Border Protection officer to amount to a false claim to United States citizenship. The respondent does not deny that she, initially, made a false claim of U.S. citizenship when first approached by the Custom and Border Patrol officer. In fact, the respondent has testified, under oath, that she made such a false claim. The respondent, herself, asserts on the witness stand that she retracted that statement, that is, the false claim, a few minutes later, when she was taken into the Custom and Border Protection Station, that is, the building at the International Border.

Through counsel, the respondent asserts in the legal memorandum at Exhibit 6 that the respondent's statement does not amount to a claim to United States citizenship, since she did not make it for any purpose or benefit under the Act. The respondent seeks to differentiate her conduct from, for example, presenting herself at a port of entry for admission or submitting an application for employment. The respondent cites another example, stating that she was not making an application for United States

passport. And, therefore, her conduct is different from these examples, which require specific intent. The respondent states that her conduct and her statements do not amount to a false claim to United States citizenship because they were made "under extreme circumstances and on the spur of the moment." See Exhibit 6.

The respondent then goes on to argue that the Department of Homeland Security exercises prosecutorial discretion and because they did not charge the respondent on the Notice to Appear, with making a false claim to U.S. citizenship, that this Court should not find that fact, that is, that she made a statement to a Customs and Border Protection officer that she was a United States citizen, to bar her from adjustment of status in these proceedings. The respondent includes, in Exhibit 6, a Policy memorandum from the Department of Homeland Security, as well as a memorandum regarding the exercise of prosecutorial discretion. Lastly, the respondent, through counsel, in Exhibit 6, argues that this Court exercises discretion in determining whether or not it should make a finding of inadmissibility based upon the respondent's false claim to United States citizenship.

The Department of Homeland Security opposes the respondent's adjustment of status, citing Section 212(a)(6)(C)(ii) of the Immigration and Nationality Act. This Court notes that under sub-section (I) of that section, that section of law states, in general, any alien who falsely represents or has falsely represented himself or herself to be a citizen of the United

States for any purposes or benefit under this Act, or any other federal or state law is inadmissible.

There is an exception set forth in Section (II) which states, essentially, that in the case of an alien making a representation to United States citizenship, if each natural parent of the alien is or was a citizen and the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation, that he or she was a citizen, the alien shall not be considered to be inadmissible. Neither party asserts that this section applies to this case and in fact, the facts bear out that this exception does not apply to this case.

The Government, in the alternative, argues that this Court should deny the respondent adjustment of status in the exercise of its discretion, due to the fact that the Government believes that she falsely claimed to be a United States citizen in an effort to continue her illegal presence in the United States. And, therefore, that she is simply not a worthy candidate for favorable exercise of the Attorney General's discretion.

The Department of Homeland Security does not dispute that the respondent is the beneficiary of an approved I-130 visa petition submitted by a United States citizen petitioner. The respondent does appear to have a feed-in I-485 application that is properly executed. There does appear to be one scriber's error on page 7 of Exhibit 4, in the record, in that the

respondent has answered no to the question that she is not in removal proceedings. This Court does not find that to be a misrepresentation, and simply finds that to be a scriber's error, as the respondent is clearly in removal proceedings, at this time during the processing of this application. Therefore, as set forth above, the only issue in this case revolves around the respondent's false claim to U.S. citizenship.

This Court has carefully considered the respondent's testimony in this case, surrounding the events of October 24, 2005. This Court does make a finding that the respondent did state, to the Custom and Border Protection officer, when she was first approached and asked her status, that she was a United States citizen. This Court also finds that she did, later, tell the Custom and Border Protection officer that she was not a United States citizen and that she did so only after she was escorted by the Custom and Border Protection officers into their station at the border.

This Court does not find convincing the respondent's argument that the fact that the Department of Homeland Security has prosecutorial discretion should have some effect on whether or not the respondent is statutorily barred from adjustment of status or not. Although, this Court does find that the Department of Homeland Security exercises its prosecutorial discretion, a determination of whether or not the respondent is eligible to adjust her status, is a statutory determination and neither this Court

nor the Department of Homeland Security exercises discretion in terms of statutory bars. It is the respondent's burden, in these proceedings, to demonstrate that she is statutorily eligible to adjust her status under Section 245(e) of the Immigration and Nationality Act.

To the extent that the respondent's arguments surrounding the fact that she retracted her false claim constitute a defense, this Court does not find that the statute allows a timely retraction of a false claim to United States citizenship. This Court finds that the statute states, clearly, that any alien who falsely represents herself to be a United States citizen, for any purpose or benefit under the Act, is inadmissible. There is no waiver for this section of law. The respondent does not assert there is a waiver, and this Court does not find that a waiver of inadmissibility exists under Section 212(a)(6)(C)(i). This Court notes that Section 212(a)(6)(C)(iii) authorizes a waiver under Section 212(a)(6)(C)(i) under the Act, but, not under 212(a)(6)(C)(ii) of the Act. Although there exists an exception, as this Court set forth above, the respondent has not argued that this exception applies and this Court finds that that exception does not apply.

This Court does find that the respondent is ineligible for adjustment of status based upon her false claim of United States citizenship. This Court finds, after listening to the respondent's testimony, that she knew full well what she was saying to the Customs and Border Protection officers. She has

clearly testified that she did not leave the United States initially when she was required to do so in 2003 because she decided that she did not want to return to Poland.

The respondent has not expressed a fear of returning to Poland during these proceedings, and to the contrary, has stated that she does not present to this Court a fear of return and has not applied for asylum, withholding of removal, or relief under Article 3 of the United Nations Convention Against Torture. This Court finds that the respondent knowingly asserted to the Custom and Border Protection officer, when she was approached and asked about her status at the border, that she was a United States citizen. This Court finds that she did this in hopes that the Border Protection officer would simply walk away and leave her to her own devices. That is, that she was hoping that the Custom and Border Protection officer would walk away, so that she could get back in her car and return to Worcester, Massachusetts to continue her illegal presence in the United States.

This Court does not find any exception that applies to the respondent in these proceedings. This Court does not find that there is an provision in the law which allows a timely retraction. In addition, in observing the respondent's demeanor, this Court did not find the respondent to be a particularly credible witness when she testified as to why she retracted her false claim and exactly when she did it. This

Court, even if it had authority to review the retraction of her claim, in some defense, does find that the respondent did not timely retract her false claim, but, only retracted her false claim when she knew that the Immigration officers were moments away from determining her real status, and she had no other choice but to admit that she was not a United States citizen. The fact remains that while the respondent was standing outside the Custom and Border Protection station on the United States side of the border, she stated to a uniformed Customs and Border Protection officer that she was a United States citizen, in hopes that he would leave her alone and allow her to return back into the interior of the United States.

This is a false claim to United States citizenship as envisioned by the Act at Section 212(a)(6)(C)(ii), and this Court finds that the respondent is statutorily ineligible to adjust her status to that of a lawful permanent resident in the United States. Therefore, this Court, finding the respondent bears the burden of demonstrating her admissibility to the United States and eligibility for adjustment of status, hereby denies the respondent's application for adjustment of status, finding that she's inadmissible under Section 212(a)(6)(C)(ii), and that there exists no waiver of inadmissibility under the Immigration and Nationality Act.

VOLUNTARY DEPARTURE

This Court, when exercising its discretion, considers all the findings set forth above, in terms of the respondent's application for voluntary departure. This Court denies the respondent's application for voluntary departure in the exercise of its discretion. As set forth above, this Court finds, after listening to the respondent's testimony, and observing her demeanor, that the respondent engaged in a calculated effort from 2003 up until she was encountered by the Border Patrol agents to ignore the law in the United States. That is, the fact that she was required to depart the United States at the expiration of her status.

The respondent chose to act in a lawless manner, essentially, stating that she decided she wanted to stay in the United States and, therefore, ignoring the fact that she was required to depart the United States on or before April 7, 2003. This Court notes that hundreds of thousands of people wait lawfully outside of the United States to process to become lawful permanent residents in the United States, and that the respondent, initially, as early as 2003, exhibited her disregard for the law in the United States in not leaving. However, the focus of this Court's denial of the respondent's voluntary departure, does and must rest upon her conduct at the United States/Canadian border on October 24, 2005.

Again, this Court finds that the respondent had made a decision to stay in the United States at whatever cost, and that was, including, a finding by this Court that the respondent chose to lie to a Custom and Border Protection officer, who approached her in uniform and asked about her Immigration status. She did so by claiming that she was a United States citizen, hoping that that would end the encounter. This Court agrees with the Department of Homeland Security that the respondent is not deserving of a favorable exercise of this Court's discretion because of that knowing and conscious conduct. And, this Court, therefore, denies the respondent's application for voluntary departure in the exercise of its discretion and incorporates into this section the entire decision as set forth above.

Respondent has not applied for any other form of relief in these proceedings. This Court has considered all of the testimony in this case and all of the Exhibits in this case up through and including Exhibit 7 in making all of the above determinations and findings.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for adjustment of status, under Section 245(a) of the Immigration and Nationality Act, be and is hereby denied;

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be and is hereby denied;

IT IS FURTHER ORDERED that the respondent be removed from the United States to Poland based upon the charge contained in the Notice to Appear at Exhibit 1.

/s/ _____
MATTHEW J. D'ANGELO
United States
Immigration Judge

United States Court of Appeals
For the First Circuit

No. 09-2295

MAGDALENA MINER,
a/k/a Magdalena Arciszewska,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

Before

Torruella, Lipez and Thompson,
Circuit Judges.

JUDGMENT

Entered: August 2, 2010

This matter is before the court on Petitioner Magdalena Miner's (a.k.a. Magdalena Arciszewska) petition for review of a decision by the Board of Immigration Appeals (BIA). We conclude that we lack jurisdiction to review the discretionary denial of voluntary departure relief. *See Hussain v. Holder*, 576 F.3d 54, 58-59 (1st Cir. 2009). Turning to Petitioner's application for adjustment of status, the Immigration Judge ("IJ") and BIA ruled that Petitioner was statutorily inadmissible per 8 U.S.C. § 1182(a)(6)(C)(ii) and thus was barred from receiving adjustment of status.

After carefully reviewing the record, we conclude that each of the factual findings underlying those decisions was supported by "substantial evidence." *Decky v. Holder*, 587 F.3d 104, 109 & 110 n4 (1st Cir. 2009). Additionally, having reviewed relevant precedent, we perceive no error in the IJ's and BIA's application of relevant statutes and regulations. *Walker v. Holder*, 589 F.3d 12, 18 (1st Cir. 2009) (noting that this court reviews the IJ's and BIA's legal conclusions de novo but affords their interpretations of statutory vagaries a certain degree of deference). Looking specifically at Petitioner's recantation argument, it would seem that the IJ and BIA concluded that, even if some sort of recantation exception or defense existed, it would not apply, as a matter of law, to a petitioner who had recanted only when and because discovery was imminent. We perceive no error in this legal conclusion. We note that the immigration judge purported to have made limited adverse credibility determinations, but we conclude that the BIA did not rely on those limited determinations and, indeed, that the IJ himself made clear that he would have arrived at the same decision even if he had taken the entirety of Petitioner's testimony at face value.

Accordingly, the petition for review is **DISMISSED** in part, and the remainder is **DENIED**.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
Kirk Carter
Saher Joseph Macarius
LaTia N. Bing
Manuel A. Palau
Ann M. Welhaf

United States Court of Appeals
For the First Circuit

No. 09-2295

MAGDALENA ARCISZEWSKA,
a/k/a Magdalena Miner,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

Before

Lynch, *Chief Judge*,
Torruella, Boudin, Lipez, Howard and Thompson,
Circuit Judges.

ORDER OF THE COURT

Entered: September 27, 2010

Pursuant to this court's Internal Operating Procedure X.C., we treat a petition for rehearing en banc also as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for

rehearing and the petition for rehearing en banc be **DENIED**.

By the Court:

/s/ Margaret Carter, Clerk.